

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRISHA LYNN ALCOCK,

Defendant-Appellant.

UNPUBLISHED

July 15, 1997

No. 186905

Saginaw Circuit Court

LC No. 94-9452-FH

Before: Hood, P.J., and McDonald and Young, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and conspiracy to commit aggravated assault, MCL 750.81a; MSA 28.276(1). Defendant was sentenced to ~~7½~~ 15 years' imprisonment for the conviction of assault with intent to do great bodily harm, reflecting enhancement based on a conviction of habitual offender, second offense, MCL 769.10; MSA 28.1082, and a concurrent term of 12 months' imprisonment for the conviction of conspiracy to commit aggravated assault. Defendant appeals as of right. We affirm defendant's convictions, but remand for articulation of the reasons for the sentence imposed or for resentencing.

This case arises from an incident in which the victim was beaten by defendant, Xouchie S. Pena¹, and Liz Ontiveros. Some days before the incident, the victim and some of her friends had stopped to get some gasoline, when Pena and some girls pulled alongside them in a car, "jumped out and came up to" the victim, and made some remarks to her. The victim and her friends drove away.

On a subsequent day, while the victim was walking home from high school, Pena, Ontiveros, Nicky Rivera, and an unidentified girl passed by her in a car. The victim had previously heard that the girls in the car were going to "jump" her, so she changed direction and walked along another street. The car turned, drove past the victim, and stopped in front of the victim. Pena, Ontiveros, and the unidentified girl got out of the car. According to the victim, Pena said that someone told her that the victim had called her a bitch and that she was going to "jump" the victim. Pena then punched the victim in the face, the victim fell, and Pena, Ontiveros and the unidentified girl began punching and kicking the

victim. Moments after the assailants stopped beating the victim, a police officer approached the victim and took her complaint regarding the incident. The other girls told the police officer that the victim had thrown something at their car. No arrests were made.

Some days later, the victim, Sharon Stueller and Cynthia Mann were stopped in a car waiting for a friend, Germaine Kelly. After Kelly got into the car, the victim looked around and saw defendant, Natalie Garza and Pena standing on a corner. Defendant and Pena ran toward the car. Stueller was unable to restart the car to drive away. Defendant and Pena were eventually able to enter the car. According to Mann, defendant hit the victim in the face more than twice. The victim did not hit defendant or Pena, but attempted to stay in the car. The victim indicated that Pena and defendant grabbed her arms and hair and pulled her out of the car. While the victim was on the ground, Pena, defendant and Garza kicked and punched the victim in the face, head, arms and chest. At some point, defendant and Garza moved away while Pena held the victim by her hair and said "Are you done? Are you done?" Pena then punched the victim's face twice more. Pena told the victim to leave and pushed her back toward the car. The victim testified that, during the beating, Pena indicated that the victim had "snitched" to the police about her.

Mann corroborated the victim's account of the fight. Mann also testified that Pena told the victim that she would kill her if she said anything else to the police. After the fight, Mann observed that the victim's face was swollen and her eyes were black and blue, puffy, and bloodshot. Stueller confirmed that a white female and a Mexican female ran toward the car, pulled the victim out of the car, and kicked the victim in the head; but she could not identify them. Stueller did hear one of the attackers threaten to kill the victim if she called the police again. Stueller observed that the victim was bruised and that the victim's eyes "were bleeding blood."

Detective Michael Van Horn of the Michigan State Police saw the victim two days following the incident and described her appearance as follows:

On her chest, on her wrist, and basically her right eye was pretty much swollen shut. There was a lot of blood in the white part of the eye. There was bruises up on the top of her forehead, and I could see little red bumps where it looked like her hair had been pulled out from the roots on her head. A lot of facial swelling. There was still some blood--dry blood in her nose--in her nasal area.

Defendant first argues that there was insufficient evidence to support her conviction of assault with intent to do great bodily harm. Defendant moved for a directed verdict of acquittal, which the trial court denied. A directed verdict of acquittal is appropriate only if, considering all the evidence in the light most favorable to the prosecution, no rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *Wolfe, supra* at 524-526. The court may not determine the weight of the evidence or the credibility of the witnesses. *Mehall, supra*; *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654

(1993). Rather, questions regarding the credibility of witnesses are left to the trier of fact. *People v Palmer*, 392 Mich 370, 375; 220 NW2d 393 (1974); *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991).

The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or offer with force or violence, to do corporal hurt to another, (2) coupled with an intent to do great bodily harm less than murder. *People v Smith*, 217 Mich 669, 673; 187 NW 304 (1922); *People v Mitchell*, 149 Mich App 36, 38; 385 NW2d 717 (1986); MCL 750.84; MSA 28.279.

Defendant does not directly focus on the specific elements of the crime. Rather, defendant argues that the injuries sustained by the victim could not support an inference that defendant acted with an intent to inflict great bodily harm. We disagree. There was overwhelming evidence that defendant, along with Garza and Pena, beat and kicked the victim in the face, head, arms and chest. The emergency room physician who treated the victim testified that the victim's injuries were serious. He further testified that kicks or blows with the fist to the head or body could cause serious injury. The doctor's assertion regarding the seriousness of the victim's injuries may appear questionable in light of the fact that treatment was limited to prescribing Tylenol, after which the victim was released from the hospital. This testimony, nevertheless, was sufficient to give rise to an inference of the necessary intent. Moreover, it would have been improper for the trial court to determine the weight of the evidence or the credibility of the physician's testimony in resolving the motion for directed verdict. *Herbert, supra*.

We also reject defendant's suggestion that the jurors were confused regarding defendant's intent and, thus, reached inconsistent verdicts by finding defendant guilty of conspiracy to commit aggravated assault rather than conspiracy to commit assault with intent to do great bodily harm. Juries may give inconsistent verdicts; however, reversal may be required when it is evident that the jury was confused, did not understand the instructions, or did not know what it was doing. *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980); *People v Lewis*, 415 Mich 443, 450 n 9; 330 NW2d 16 (1982). Here, defendant concedes that the "verdicts in this case are not even necessarily inconsistent." Furthermore, defendant offers no evidence indicating that the jury was confused other than the alleged inconsistency itself. The trial court did not err in denying the motion for a directed verdict and submitting the charge of assault with intent to do great bodily harm to the jury.

Defendant next argues that the sentence imposed by the trial court is disproportionately severe, and the trial court failed to articulate its reasons for the sentence imposed. To facilitate appellate review, the sentencing court must articulate on the record the criteria considered and the reasons for the sentence imposed. *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987); *People v Sandlin*, 179 Mich App 540, 542; 446 NW2d 301 (1989). The sentencing guidelines do not apply to habitual offenders, and may not be considered on appeal in determining an appropriate sentence for an habitual offender. *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996); *People v Cervantes*, 448 Mich 620, 625, 630; 532 NW2d 831 (1995); *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). The guidelines, however, may be considered, but need not be considered, by the trial court. *People v Haacke*, 217 Mich App 434, 438; 553 NW2d 15 (1996).

In imposing sentence for defendant's conviction for assault with intent to do great bodily harm, the trial court stated:

As to the sentence of Trisha Lynn Alcock, it is the sentence of Count I that she serve no less than 7 ½ and a half [sic] years in prison to no more than 15 years in prison. *This sentence is imposed pursuant to the sentencing guidelines and consideration of the habitual offender second conviction status.*

Although the trial court asserted that the sentence was imposed pursuant to the sentencing guidelines in conjunction with defendant's habitual offender status, the court did not offer any explanation of why the particular sentence imposed, which exceeded the guidelines range of twenty-four months to sixty months, was appropriate under the circumstances of this case. Given that the guidelines may not be considered by this Court in reviewing the defendant's sentence, the trial court's statement in imposing sentence was insufficient to allow us to review whether the sentence is proportionate to the offense and the offender. We therefore remand for articulation of those reasons or for resentencing. *People v Triplett*, 432 Mich 568, 569; 442 NW2d 622 (1989).

Affirmed, but remanded for articulation of the reasons for the sentence imposed or for resentencing. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Gary R. McDonald

/s/ Robert P. Young, Jr.

¹Xouchie S. Pena was tried with defendant and convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, obstruction of justice, MCL 750.505; MSA 28.773, extortion, MCL 750.213; MSA 28.410, and conspiracy to commit aggravated assault, MCL 750.81a; MSA 28.276(1). Pena has an appeal pending in Docket No. 186907.